IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.8.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

WRIT PETITION No.24252 OF 2006
AND M.P.Nos.1 TO 4 OF 2006

Radha Exports (India) Ltd.,
rep.by its Managing Director
M.Krishnan, Chennai 2. ... Petitioner

Vs.

1.The State of Tamil Nadu,
rep.by its Secretary,
Industries Department,
Fort St.George,
Chennai-600009.

2.Tamil Nadu Minerals Limited,
rep.by its Chairman & Managing Director,
31, Kamarajar Salai,
Chepauk, Chennai-600 005.

3.Tender Scrutiny Committee
Tamin Minerals Limited,
31, Kamarajar Salai,
Chepauk, Chennai-600005. ... Respondents

* * *

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Mandamus, directing the third respondent to reconsider the applications of the petitioner insofar as selection of eligible applications in respect of 23rd Global Tender is concerned.

* * *

For petitioner : Mr.T.R.Rajagopalan,S.C. For M/s.S.Haja Mohideen Gisthi, and R.Radhakrishnan

For R.1 : Mr.R.Thirugnanam, Spl.G.P.

For R.2 & R.3 : Mr.R.Viduthalai, Advocate-General for Mrs.A.V.Bharathi

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By the consent of either counsel and in view of the urgency, the writ petition itself is taken up for final disposal.

2. The respondents 1 and 2 are controlling the Granite Quarries in Tamil Nadu. The third respondent is selecting people to carry on the quarrying contracts, by way of tender system. In the 22nd Global Tender No.1351, dated 26.5.2004, the petitioner participated, paying Earnest Money Deposit through Amex Bank and security deposits through ING Vysya Bank and Standard Chartered Bank, which were accepted by the second respondent.

3. Information was furnished by the second respondent, calling for applications from the interested persons, to participate in the 23rd Global tender, fixing the technical bid on 24.7.2006 and the price bid on 26.7.2006. Pursuant to the information made available, the petitioner submitted applications for 33 quarries obtaining 33 Demand Drafts, each for Rs.2,000/=, towards applications fee and 33 Demand Drafts, each for Rs.1 lakh towards Earnest Money Deposit through Standard Chartered Bank, as done in the past for the year 2004-2005, which were accepted by TAMIN and awarded the contract. But, surprisingly, it was informed, orally, that only a few eligible persons are permitted to take part in the price bid to be taken place.

4. The Committee informed that the payments of EMD and applications fees were not paid through Nationalised Bank and as it was paid through other Banks, the petitioner was not selected as an eligible person to take part in the price bid. The exercise done by the third respondent, thus preventing the petitioner from participating in the tender, is arbitrary, illegal and contrary to the established principles of natural justice. The Committee has selected candidates eligible, according to their whims and fancies and not on any standard, fixed parameters. The third respondent, without applying its mind, purposely and wantonly rejected the applications of the petitioner, thereby causing big dent in the petitioner's business career, which will reflect in the global market also. On the above grounds, among other grounds, this writ petition is aimed, to issue a Writ of Mandamus directing the third respondent to re-consider the applications of the petitioner, insofar as selection of eligible applications, in respect of 23rd Global Tender is concerned.

5. The second respondent, by filing a detailed counter opposed the writ petition, inter-alia, on the grounds that the applications of 13 parties, including the petitioner, who have not furnished the Demand Drafts from the Nationalised Banks, as per the tender

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conditions, were rejected; that the past actions and past transactions have no relevance here, since tender of each year is a separate offer to enter into a contract of sale with the prescribed conditions specified in the tender documents; that the petitioner has no reason for not submitting the Demand Drafts drawn towards Earnest Money deposit from the Nationalised bank, if he wanted to participate in the tender; that since the petitioner did not follow the tender conditions, his applications were rejected and certainly not with any intention willfully or otherwise, as falsely averred in the affidavit; that there is no motive for the respondents to reject the applications of the petitioner, if he had complied with the terms and conditions of the tenders and that the writ petition itself is not maintainable in view of the law settled by the Supreme Court, thereby praying for the dismissal of the writ petition.

6. Heard Mr.T.R.Rajagopalan, the learned senior counsel for the petitioner, Mr.R.Thirugnanam, the learned Special Government Pleader for the first respondent and Mr.R.Viduthalai, the learned Advocate General for the respondents 2 and 3.

7. Mr.T.R.Rajagopalan, the learned senior counsel appearing for the petitioner, urged only one point before me viz. that disqualifying the petitioner, from participating in the price bid, on the ground that the Demand Drafts were not drawn from the Nationalised Bank whereas they were drawn from other Banks, is arbitrary, offending the natural justice, that too, in view of the fact that drawing the Demand Drafts from the Nationalised Bank is not a main condition for the eligibility. It is the further submission of the learned senior counsel that in the previous global tender, the Authorities have accepted the Demand Drafts drawn from other Banks, not from the Nationalised Bank and this being the position, refusal to accept the same in the 23rd Global Tender, is arbitrary, illegal and contrary to the established principles of natural justice.

8. Mr.R.Viduthalai, the learned Advocate General appearing on behalf of the respondents, responding to the above said submissions of the learned senior counsel for the petitioner, would submit that the writ petition itself is not maintainable, since tender conditions are not challenged; that there is no violation of natural justice or arbitrariness in the act of the third respondent; that if the case of the petitioner is accepted, it would amount to re-writing the tender conditions, which is not within the realm of the Court jurisdiction and that if the writ petition is allowed, the other persons, whose tenders were rejected, also should be called for, which would cause undue delay, which should be avoided. On the above said grounds, inviting my attention to the Rulings of the Apex Court also, it was strenuously

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contended that the writ petition is not at all maintainable and the rejection of the applications of the petitioner is legally sound.

9. The second respondent invited sealed tenders for the purchase of black and other coloured dimensional granite blocks produced by TAMIN from its various quarries in Tamil Nadu State, as per the Tender No.13085/EXI/2006, dated 21.6.2006 on 27.6.2006, which is called "23rd GLOBAL TENDER". Pursuant to the tender notification, admittedly, the petitioner had submitted tender documents. As per the 'Instruction to Tenderers', each tender must be accompanied by deposit of Rs.1 lakh as Earnest Money Deposit, for each quarry, by demand draft on any Nationalised Bank, payable in favour of Tamil Nadu Minerals Limited, Chennai-600005. But, while submitting the covers (1) and (2), the petitioner has not submitted the Demand Drafts drawn on any one of the Nationalised Banks, whereas he had submitted the Demand Drafts drawn from the Standard Chartered Bank, which is admittedly notified and approved by the Reserve Bank of India, as 'Scheduled Commercial Bank'. However, in view of the conditions available in the 'Instructions to Tenderers', since the Demand Drafts were not drawn from the Nationalised Bank, the petitioner was disqualified in the initial stage itself i.e. at the stage of technical bid on 24.7.2006, not permitting him to participate in the price bid contemplated on 26.7.2006. Though no written communication was given to the petitioner, it is admitted that his technical bid was rejected, as admitted in counter paragraph No.1. As far as the above facts are concerned, no dispute between the parties. Under the above stated facts, it is to be seen, whether the disqualification of the petitioner, at the stage of technical bid itself, is correct or not, on the basis of the settled principles of law.

10. The learned Advocate General, inviting my attention to a case in TATA CELLULAR vs. UNION OF INDIA (AIR 1996 SC 11), would submit that 'the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract'. In the above decision, a Constitution Bench of the Apex Court has held that 'the Government must have freedom of contract, but at the same time, that freedom must be free from arbitrariness, not affected by bias or actuated by mala-fides'. If it is shown that there was no arbitrariness or bias and mala-fides, it is held, 'there can be no question of infringement of Article 14, if the Government tries to get the best person or the best quotation, in view of the fact the right to choose that kind of person cannot be termed to be an arbitrary power'. The above settled position is not in dispute.

11. In this case, the writ is not aimed challenging the conditions of the tender as if the conditions are onerous, violative of principles of natural justice, etc. Therefore, based

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upon the above decision alone, rejecting the writ petition, as if there is an attempt to re-write the conditions of the tender, may not be proper. On the other hand, if the ground on which the tender of the petitioner has been rejected, amounts to main condition or vital condition to the tender or made so by incorporating default clause, then, certainly, for the non-compliance of the same, the Court may not come to the aid of the person, who committed the fault or violated the said condition, whether it affects the right of the respondents or not. Contra, if it is shown that the petitioner had not violated the conditions of the tender, which are very very essential to the respondents, to choose the best person of the choice, and if it is further shown for not complying with the ancillary or subsidiary conditions, the tender was rejected, then this Court can exercise its jurisdiction under Article 226 of the Constitution of India, to set aside the arbitrariness exercised by the Authorities concerned, since this Article confers power upon the High Court, 'to issue writs for the enforcement of any of the rights infringed by the acts of the Authorities or to achieve for any other purpose.'

12. The right of the party, if any, affected or not accepted by the Authorities concerned, by the fault committed by the person, who seeks the Writ, then, I feel, exercising the extraordinary jurisdiction conferred under Article 226 of the Constitution, in favour of that person, may not be proper, since it would amount to favouring a person, who has not obeyed the offer or the conditions on which basis, he attempted to participate in any transaction. In this case, no complaint is made against the Authorities concerned, as if, they have acted arbitrarily against the conditions available in the 'Instructions to the Tenderers', though it is alleged, generally, not accepting the Demand Drafts, drawn by the petitioner, would amount to such an act. For the reasons, which I am going to assign infra, on the basis of the conditions available in the 'Instructions to Tenderers', admittedly, the petitioner has not obeyed the conditions and knowing fully well that the Demand Drafts should be taken only from the Nationalised Bank, he took the Demand Drafts from the Standard Chartered Bank, which would amount to his own action, on which basis, the offer is not accepted. Therefore, analysing the case, as per the materials placed before me, the rejection of the offer in Cover No.1, is not by any arbitrary act of the Authorities or high-handed acts of the Authorities and if at all, for the rejection, the petitioner alone has to be blamed. However, the person, who has not obeyed the command in the 'Instructions to Tenderers' would urge that the Demand Drafts contemplated in the 'Instructions to the Tenderers' is not an essential condition and therefore, the rejection, on that basis, should be construed as violative and in this view alone, we have to see the other aspects of the case.

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13. In A.GOPAL vs. AIRPORTS AUTHORITY OF INDIA AND ANOTHER (2005 Writ L.R. 672), there was a challenge regarding the qualification viz. two years experience of managing a car park with Government Departments, which was essential in the said tender. When that condition was challenged, a Division Bench of this Court has held that 'the condition is a reasonable condition and there is nothing unreasonable'. This kind of situation is not available before me and therefore, the above decision would not advance the case of the respondents, leading to the dismissal of the Writ Petition, straight away.

14. In GLOBAL ENERY LTD. AND ANOTHER vs. M/S.ADANI EXPORTS LTD. AND OTHERS (AIR 2005 SC 2653), the Honourable Apex Court has taken the strong view that 'the terms of invitation of tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of tender, unless they are wholly arbitrary, discriminatory or actuated by malice'. In Paragraph No.10 of the said judgment it is held:

> "The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a Bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

In this case also, there was some slackness on the part of the tenderer, in depositing the earnest money, as per the instructions. When that was relaxed by the learned single Judge, the same was set aside by the Division Bench, upheld by the Apex Court. While considering this, the Apex Court held, as extracted above, the terms of the tenders are not , generally, subject to judicial scrutiny, which principle also has to be applied in this case. The only ground, as said above, is that the petitioner has not violated or offended or infringed or disputed any terms of invitation of tender, which are essential to choose a proper and fit person whereas, it at all, he has not complied with an ancillary or subsidiary condition, which should not be a cause to deny his opportunity to participate in the price bid. Therefore,

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we have to see, what are all the tender conditions and which condition the petitioner had violated, etc.

15. 'Instructions to Tenderers' dated 21.6.2006 prescribes conditions viz. eligibility to participate in condition No.1(a), as seen from typed set page No.22. Condition No.1(b) envisages, 'who are all not eligible to participate in the tender'. It is not the case of anybody that the petitioner comes either under 1(a) or 1(b). The procedure adopted is quotation by two cover system, not in dispute. Cover (1) is the stage of technical bid, which should contain EMD, audited accounts, status proof, undertaking, consent letters, proof of established clientele, financial soundness, etc., as detailed under the caption '13-A Quotation- two cover system", which is available at page No.28 of the typed set. Condition No.13-B prescribes how the Earnest Money Deposit should be paid, which says "each tender must be accompanied by a deposit of Rs.1,00,000/= (Rupees Onle Lakh only) to be specified as Earnest Money Deposit FOR EACH QUARRY by Demand Draft on any Nationalised Bank payable in favour of TAMIL NADU MINERALS LIMITED, CHENNAI-600005".

16. Admittedly, this condition is not literally complied with by the petitioner, since the Demand Drafts submitted by him were not drawn from any Nationalised Bank. True, as submitted by the learned senior counsel for the petitioner, the Demand Drafts drawn on the Standard Chartered Bank are as valid as one drawn from any Nationalised Bank. However, for the reasons best known to the Authorities concerned, they have specifically stated that the EMD for each quarry by Demand Draft must be drawn on any Nationalised Bank payable in favour of TAMIN, Chennai, which cannot be challenged or questioned, labelling the same as an ancillary condition and requires no strict compliance, since as submitted, it forms part of the conditions of the tender.

17. The 'eligibility' and 'disqualification' are specified under the caption "Conditions", as condition Nos.1(a) and 1(b) in the 'Instructions to Tenderers' and they alone should not be taken as the conditions for accepting the offer. The document should be read as a whole. If there are other conditions, though not captioned under the 'conditions', the compliance of the same is also a necessity and those conditions available then and there in the 'Instructions to the Tenderers' cannot be described as ancillary or subsidiary, in order to achieve the purpose of the main conditions alone, which are described under the caption 'conditions'. The Authorities concerned also imposed certain conditions, such as, how the covers 1 and 2 should be submitted and what would be the result on such failure and they also should be taken as essential conditions for the acceptance of the tenders. In this view, we have to see, condition No.13-A.

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18. According to Condition No.13-A(i), in the technical bid cover (Cover-I), there should be documents, evidencing Earnest Money Deposit of Rs.1 lakh per quarry, in addition to other documents. The payment of Earnest Money Deposit is described, as seen from Condition No.13-B, which says, "each tender must be accompanied by a deposit of Rs.1,00,000/= (Rupees Onle Lakh only) to be specified as Earnest Money Deposit FOR EACH QUARRY by Demand Draft on any Nationalised Bank payable in favour of TAMIL NADU MINERALS LIMITED, CHENNAI-600005". Therefore, it is the duty of the tenderer, to comply with this condition also, viz. the Earnest Money Deposit should be paid by Demand Draft drawn on any Nationalised Bank, payable in favour of TAMIN, Chennai. If we read Condition No.13-B coupled with condition No.13-A(i), one thing is clear, no option or discretion is left to the tenderer to deposit Earnest Money, in the manner he likes. We should remember, once again here, none of the conditions in the tender is under challenge. Therefore, it is not for this Court, to scrutinise the wisdom of the Authorities, as to why they have prescribed such conditions for the deposit of Earnest Money. If Condition No.13-A (i)(a) and Condition No.13-B alone are available, even it could be said, there is nothing wrong on the part of the tenderer in furnishing Demand Drafts drawn on any other Bank, since there may not be any difficulty in encashing the Demand Drafts. But, Condition No.13-A (iv) specifically says, 'if the tenderer fails to comply with the above conditions, their offers will be totally rejected', thereby making it crystal clear that the deposit of Earnest Money and the way of deposit of the same were also considered, by the Authorities concerned, as the main condition, otherwise generally and ordinarily, there need not be any such default clause.

19. The very fact, the above said default clause is introduced or incorporated in the 'Instructions to the Tenderers' would suggest, empathetically, the condition that the Demand Drafts should be drawn on any Nationalised Bank, will not come within the meaning of ‘ancillary’ or ‘subsidiary’ condition and in this view, that condition also should be strictly followed, irrespective of the consequences. The petitioner, knowing fully well, that the 'Instructions' contemplates Demand Drafts to be drawn on any Nationalised Bank, should have drawn the Demand Drafts only from the Nationalised Bank not from any other Bank. Despite the fact, the petitioner knew Condition No.13-A(iv), he himself has violated the conditions and this being the position, he cannot blame the Authorities concerned and seek the aid of the Court, under Article 226 of the Constitution of India, as if his right is affected by the illegality or arbitrariness, said to have been committed by the respondents. Under the above said circumstances, this Court, exercising the power under Article 226 of the Constitution of

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India, cannot compel the Authorities to relax that condition, which may amount to issuing the directions to the Authorities to do an act violative of the 'Instructions to the Tenderers' itself. The above said non-compliance also cannot be taken as an error, in view of the default clause available and on the basis of the waiver, which was once done, this Court cannot compel the Authorities to waive the said condition for the 23rd Global Tender also.

20. Though in the affidavit, many allegations are leveled against the third respondent, such as the third respondent prevented the petitioner from participating in the tender, arbitrarily, illegally, contrary to the established principles of natural justice, nothing is brought to surface, to bring the conduct of the third respondent within the above terms, thereby to exercise the jurisdiction of this Court, under Article 226 of the Constitution of India. On the other hand, the conditions incorporated under clause 13 of 'Instructions to Tenderers' make it mandatory on the part of the tenderer, to comply with the conditions, failing to comply, rejection of the offer. If it is an ancillary or subsidiary condition, there need not be any such default condition.

21. Mr.T.R.Rajaraman, learned senior counsel for the petitioner inviting my attention to the decision in M/S.PODDAR STEEL CORPORATION vs.M/S.GANESH ENGINEERING WORKS AND OTHERS (AIR 1991 SC 1579), would submit that 'the requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the other which are merely ancillary or subsidiary with the main object to be achieved by the conditions' and in this case drawing Demand Draft in the name of the Nationalised Bank, should come within the meaning of merely 'ancillary' or 'subsidiary' condition with the main object to be achieved by the other conditions and therefore, for the non-compliance of the same, in the literal sense, rejecting the tender and preventing the petitioner from participating in the price bid, is arbitrary that too, considering the conduct of the petitioner in the previous year.

22. In the case involved in the above decision, one of the clauses in the tender was that the tenderer should deposit by cash or by demand draft drawn on the State Bank of India. But, in that case, the tenderer sent a cheque of the Union Bank of India drawn on its own branch and not on the State Bank. The Authorities concerned, deviating from the relevant clause, accepted the cheque of the Union Bank of India, which was challenged by the affected party. Considering the facts and circumstances of the above said case, it is held by the Apex Court that

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"As a matter of general proposition, it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

From the above observation, one thing is certain that the Authorities have waived the condition, which is within their power and that is why, it is observed 'if the conditions are merely ancillary or subsidiary, it must be open to the Authority to deviate from and not to insist upon the literal compliance of the condition in appropriate cases', which cannot be a ratio decidendi to be followed in all the cases.

23. In this case, the Authorities have not decided to deviate or waive the conditions available in Condition No.13-B, whereas they insisted strict compliance, providing default clause. The petitioner, being a tenderer, has to follow the conditions prescribed in the tender form, whether they are main condition or ancillary or subsidiary condition. Insisting EMD by demand draft on any Nationalised Bank, though not incorporated in the essential conditions at first, it is treated as essential condition. As pointed out, it is stated in clause (iv), that if the tenderer fails to comply with, their offer will be totally rejected. Because of this condition and the non-compliance of Condition No.13-B, the third respondent, who can deviate or waive, if they have considered this one as ancillary or subsidiary, but refused to do so and the same cannot be insisted upon by filing a writ petition. The Authority concerned is empowered to waive or has the power to waive or deviate, if at all that can be done on his own and that cannot be insisted upon, as of right, as indirectly claimed in this case. In the case cited above, if it is not the waiver, as rightly contended by the learned Advocate General, then only, the Ruling will be applicable to the present facts of the case.

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24. In view of my finding supra, this condition also should come, as essential, it is not at all possible to insist upon the third respondent, to accept the Demand Drafts, which are not in compliance with Condition No.13-B of the tender conditions. The Court, while exercising the jurisdiction under Article 226 of the Constitution, directs the third respondent to accept such Demand Drafts, it will infringe the tender conditions, in a way re-writing, at least one of the conditions, which is not within the realm of this Court, as ruled by the Apex Court, cited supra.

25. In the light of the above discussion and considering the facts and circumstances of the case,I do not find any arbitrariness or illegality in rejecting the tender bid of the petitioner, since he failed to comply with condition No.13-B of the tender conditions, which should follow, the writ petition does not deserve acceptance.

26. The submission of the learned senior counsel for the petitioner, Mr.T.R.Rajagopalan, that in the previous year, the same conditions were available and despite the Demand Drafts were drawn from the Standard Chartered Bank, they were accepted, may not be precedent to follow for the subsequent year also, since each tender is a separate offer leading to separate acceptance, etc. The then Tender Committee might have thought it fit to deviate from the said tender conditions,ignorantly or otherwise, but the present Tender Committee considering Condition No.13-B, as a whole, has not decided to deviate from the conditions or waive, in which I am unable to find any illegality. For these reasons, the writ petition should fail.

In the result, this writ petition is dismissed. Consequently, W.P.M.P.Nos.1 to 4 of 2006 are closed. No costs.

Rao

Sd/
Asst.Registrar

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Sub Asst.Registrar

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TO

1.The Secretary to the Government
of Tamil Nadu,
Industries Department,
Fort St.George,
Chennai-600009.

2.The Chairman and Managing Director,
Tamil Nadu Minerals Limited,
31, Kamarajar Salai, Chepauk, Chennai-600 005.

3.The Tender Scrutiny Committee
Tamin Minerals Limited,
31, Kamarajar Salai,
Chepauk, Chennai-600005.

+ 1 cc to Government Pleader SR No.37455

+ 1 cc to Mr. A.V. Bharathi, Advocate SR No. 37367

+ 1 cc to Mr.S. Haja Mohideed Gisti, Advocate SR No.37345

Order in W.P.No.24252/2006 &
WPMP.Nos.1 to 4/2006

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